

1
2 **WO**

3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 Cornelius James Caldwell,) No. CV 08-2086-PHX-DGC (MHB)
9 Plaintiff,) **ORDER**
10 vs.)
11 Sun City Endoscopy, et al.,)
12 Defendants.)
13 _____)

14 Plaintiff Cornelius James Caldwell, who is confined in the California State Prison-
15 Solano, in Vacaville, California, filed a *pro se* Complaint. (Doc.# 1.) The Court dismissed
16 Count III for failure to state a claim and ordered Plaintiff to show cause why his remaining
17 claims and this action should not be dismissed as barred by the statute of limitations. (Doc.#
18 10.) Plaintiff has filed a response in which he attempts to show cause why his remaining
19 claims should not be dismissed as time-barred. (Doc.# 12.) Plaintiff has failed to show cause
20 why his remaining claims and this action are not barred by the statute of limitations. This
21 action will therefore be dismissed.

22 **I. Statutory Screening of Prisoner Complaints.**

23 The Court is required to screen civil complaints brought by prisoners. See 28 U.S.C.
24 § 1915(e)(2) (*in forma pauperis* statute); 28 U.S.C. § 1915A (prisoner case screening
25 statute); and 42 U.S.C. § 1997e(c) (Civil Rights of Institutionalized Persons Act). The Court
26 must dismiss a complaint or portion thereof if a plaintiff has raised claims that are legally
27 frivolous or malicious, fail to state a claim upon which relief may be granted, or seek money
28 relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

II. Complaint.

Plaintiff alleged two state law counts for the wrongful death of his mother, Marlene Smith Foulds, due to medical malpractice. He sued Sun City Endoscopy, Arrowhead Hospital, and Drs. David L. Child, Craig Nagle, Caren Borjeson, and Jagdeep K. Bains, who were employed at Boswell Memorial or Arrowhead Hospitals. Plaintiff seeks compensatory relief.¹

Except as otherwise indicated, Plaintiff alleged the following facts: Plaintiff's mother lived in Surprise, Arizona, when she sought treatment for rectal pain. His mother, who was poor, belonged to an unidentified Health Maintenance Organization (HMO). That HMO wrongfully delayed prompt examination of Ms. Foulds by physicians. When she was finally examined, she was diagnosed with colon cancer, which necessitated surgery to remove tumors in December 2003. Shortly after the colon surgery, Ms. Foulds began to seek examination of a painful lump in her breast, but the HMO again delayed an examination. By the time she was examined, she was found to have breast cancer and to require a mastectomy. Depression over her health prompted Ms. Foulds to move from Arizona back to Cleveland, Ohio, to die. According to publicly available records, Plaintiff's mother died in Ohio on February 24, 2006.²

III. Failure to State a Claim Under State Law.

In Counts I and II, Plaintiff alleged state law claims for medical malpractice and/or wrongful death of his mother. A complaint fails to state a claim where a defense is complete and obvious from the face of the pleadings. Franklin v. Murphy, 745 F.2d 1221, 1228 (9th Cir. 1984) (applying former § 1915(d) now codified at 28 U.S.C. § 1915(e)(2)(B)). Further, in the absence of waiver, a court may raise the defense of statute of limitations *sua sponte*. See Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 687 (9th Cir. 1993); see also Hughes

¹ Boswell Memorial and Arrowhead Hospitals are located in the Phoenix metropolitan area. Plaintiff alleged that the events at issue occurred in Arizona. It appears that the parties are completely diverse for purposes of jurisdiction, although Plaintiff did not allege an amount in controversy.

² See <http://ssdi.rootsweb.ancestry.com/cgi-bin/ssdi.cgi>.

1 v. Lott, 350 F.3d 1157, 1163 (11th Cir. 2003) (appropriate to dismiss prisoner's complaint
 2 *sua sponte* as time-barred under § 1915(e)(2)(B)); Nasim v. Warden, Maryland House of
 3 Corr., 64 F.3d 951, 956 (4th Cir. 1995) (*en banc*) (same); Pino v. Ryan, 49 F.3d 51, 53 (2d
 4 Cir. 1995) (same); Moore v. McDonald, 30 F.3d 616, 620 (5th Cir. 1994) (same); Johnson
 5 v. Rodriguez, 943 F.2d 104, 107-08 (1st Cir. 1991) (same).

6 The Arizona statute of limitations for personal injury actions, including medical
 7 malpractice and wrongful death, is two years. See A.R.S. § 12-542; Madden-Tyler v.
 8 Maricopa County, 943 P.2d 822, 824 (Ariz. Ct. App. 1997); Vaughan v. Grijalva, 927 F.2d
 9 476, 478 (9th Cir. 1991). Section 12-542 of the Arizona Revised Statutes provides in
 10 relevant part that:

11 [T]here shall be commenced and prosecuted within two years after the cause
 12 of action accrues, and not afterward, the following actions:

13 1. For injuries done to the person of another including causes of action for
 14 medical malpractice as defined in § 12-561.³

15 ³ Section 12-561 provides that unless the context otherwise requires:

16 1. "Licensed health care provider" means both:

17 (a) A person, corporation or institution licensed or certified by the state to
 18 provide health care, medical services, nursing services or other health-related
 19 services and includes the officers, employees and agents thereof working under
 20 the supervision of such person, corporation or institution in providing such
 21 health care, medical services, nursing services or other health-related services.

22 (b) A federally licensed, regulated or registered blood bank, blood center or
 23 plasma center collecting, processing or distributing whole human blood, blood
 24 components, plasma, blood fractions or blood derivatives for use by a licensed
 25 health care provider and includes the officers, employees and agents working
 26 under the supervision of the blood bank, blood center or plasma center.

27 2. "Medical malpractice action" or "cause of action for medical malpractice"
 28 means an action for injury or death against a licensed health care provider
 based upon such provider's alleged negligence, misconduct, errors or
 omissions, or breach of contract in the rendering of health care, medical
 services, nursing services or other health-related services or for the rendering
 of such health care, medical services, nursing services or other health-related
 services, without express or implied consent including an action based upon
 the alleged negligence, misconduct, errors or omissions or breach of contract
 in collecting, processing or distributing whole human blood, blood
 components, plasma, blood fractions or blood derivatives.

1 2. For injuries done to the person of another when death ensues from such
2 injuries, which action shall be considered as accruing at the death of the party
3 injured.

4 Arizona law provides for the tolling of the statute of limitation after a cause of action accrues
5 for the period during which a plaintiff was less than 18 years old or of unsound mind.⁴
6 A.R.S. § 12-502.

7 Plaintiff filed his complaint on November 10, 2008. For his state claims to be timely,
8 they must have accrued no earlier than November 10, 2006, two years before his Complaint
9 was filed. Under state law, a claim for wrongful death accrues at the death of the party
10 injured. As noted above, Plaintiff's mother died in February 2006. The Court accordingly
11 ordered Plaintiff to show cause why his state law claims should not be dismissed as time-
12 barred.

13 In his response, Plaintiff states that he is his mother's only child and a layperson, who
14 lacked access to Arizona law. He "throws" himself on the mercy of the Court. Plaintiff also
15 asserts that he at one point had a breakdown and was treated for depression. Plaintiff
16 otherwise argues, based on inapposite case law, that he should be allowed to proceed under
17 42 U.S.C. § 1983. Plaintiff acknowledges that his mother died in February 2006 and that he
18 learned as much no later than March 2006. While the distress and loss Plaintiff expresses
19 over his mother's death are understandable, Plaintiff fails to show any legally cognizable
20 basis for his failure to commence suit prior to the running of the statute of limitations.
21 Accordingly, Plaintiff's remaining state law claims and this action will be dismissed as
22 barred by the statute of limitations.

23 **IT IS ORDERED:**

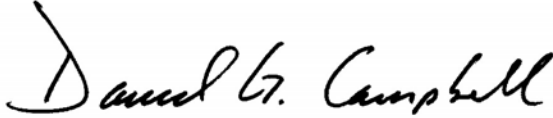
24 (1) Counts I and II and this action are **dismissed**.

25 (2) The Clerk of Court must enter a judgment of dismissal of this action with

26
27 ⁴Arizona's former tolling provision for prisoner causes of action, A.R.S. § 12- 502(B),
28 was repealed effective July 20, 1996. See TwoRivers v. Lewis, 174 F.3d 987, 995 (9th Cir.
1999). Because Plaintiff's claims accrued after repeal of the tolling provision, he is not
entitled to tolling on that basis.

1 prejudice that states that the dismissal counts as a “strike” under 28 U.S.C. § 1915(g).

2 DATED this 14th day of April, 2009.

3
4
5 

6
7

David G. Campbell
United States District Judge
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28